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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDIA BROTHERS AND DAVID L. CORSI,

PETITIONERS

v.

COUNTY OF SUMMIT, OHIO, MEMBERS OF ITS COUNTY COUNCIL AND ITS COUNTY EXECUTIVE, *ET AL.*,

RESPONDENTS

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Does the Fourth Amendment demand that law enforcement officers disclose in a second or subsequent search warrant affidavit information they discovered during an initial search that casts doubt upon the veracity of a confidential informant?

Does the Fourth Amendment demand that law enforcement officers disclose in a second or subsequent search warrant affidavit the absence of items that, based upon their confidential informant's information, they expected to find?

Claudia Brothers and David L. Corsi,

Petitioners,

Vs.

COUNTY OF SUMMIT, Members of its County Council and its County Executive; DREW ALEXANDER, Summit County Sheriff Officer, In his individual and official capacity; LINDA K. RINEAR, Summit County Sheriff Officer, In her individual and official capacity; L. MOMCHILOV, Summit County Sheriff Officer, In his individual and official capacity; KELLY FATHEREE, Summit County Sheriff Officer, In her individual and official capacity; JOHN DOE, 1 through 10, Supervisors, Summit County Sheriff's Officers, In their individual and official capacities,

Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners **CLAUDIA BROTHERS** and **DAVID L. CORSI** make the following disclosure:

Is either Petitioner a subsidiary or affiliate of a publicly owned corporation?

No.

Is there a publicly owned corporation, not a party to this appeal, which has a financial interest in the outcome?

No.

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STATEMENT OF THE BASIS FOR JURISDICTION

This case originated in the United States District Court for the Northern District of Ohio, Eastern Division, which had federal question jurisdiction pursuant to 28 U.S.C. § 1331 over the Petitioners' civil rights actions under 42 U.S.C. § 1983, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the Petitioners' claims under Ohio law. The District Court issued its decision granting summary judgment in the Respondents' favor on all claims on May 25, 2007. The Petitioners timely appealed that decision to the United States Court of Appeals for the Sixth Circuit, which affirmed on March 27, 2008. The Petitioners then made a Petition for Rehearing En Banc to the Sixth Circuit; that petition was denied on July 10, 2008.

The Petitioners now ask this Court to grant Certiorari on two grounds. First, the Court has not spoken to either of the questions presented by the Petitioners. Second, a conflict exists between the key holding in this case – which the Sixth Circuit adopted without comment – and holdings of the Third, Fifth and Ninth Circuits.

TEXT OF CONSTITUTIONAL PROVISION CITED

Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Claudia Brothers and David Corsi were the co-owners of the KD Daycare, a Summit County, Ohio, daycare facility that became the focus of a flawed criminal investigation by the Summit County, Ohio, Sheriff's Department. In their zeal, the Respondents ignored glaring inconsistencies in the story of one of its confidential informants – a third grade boy – and nevertheless instigated searches of the daycare and Corsi's home, and Corsi's arrest. When the boy recanted, all charges against Corsi were dropped – but by then, Brothers' and Corsi's reputations were destroyed and their finances and business were in ruins.

After the Summit County Prosecutor's Office dropped the charges against Corsi, he and Brothers filed a complaint in the United States District Court for the Northern District of Ohio on May 23, 2003, under 42 USC § 1983, claiming the Defendants-Appellees violated their Fourth Amendment rights including 1) unlawful and improper search and seizure; 2) the false imprisonment and false arrest of David Corsi; 3) severe emotional distress; and 4) their losses resulting from the Defendants'-Appellees' invasion of Brothers' and Corsi's privacy and from defamatory statements made about them and their business. The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 over the Petitioners' 42 U.S.C. § 1983 action, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the Petitioners' state law claims.

The Petitioners' ordeal began on or about March 18, 2002, when Captain Jeff Buck of the Reminderville, Ohio, Police Department contacted

the Summit County Sheriff's Department to report that the parent of a child in the Daycare alleged that the owners were taking children into a private room alone. The Summit County Sheriff's Department assigned Detective Linda Rinear to investigate. Although it is not a crime for daycare providers to be alone with children, Rinear nevertheless determined to investigate further.

Rinear first interviewed Jean Hollan-Vincer from the Ohio Department of Job and Family Services, who was in charge of inspecting the Daycare for violations of the State of Ohio's licensing rules and law. Hollan-Vincer knew of no illegal conduct, and the ODJFS had approved the daycare. Rinear then called Cindy Kozlik, the parent who had originally contacted the Reminderville Police Department. Kozlik told Rinear she "knew of no illegal conduct." Rinear then spoke to two disgruntled Daycare employees who said that Corsi took children into a private room, but who knew of no illegal conduct. Rinear then went to the Nordonia Hills Elementary School to interview two 9-year-old children who attended the daycare: C.M. and M.Z.

M.Z. made no statement that indicated any illegal behavior on the part of Corsi or Brothers. C.M. claimed: 1) that he was in a secret club; 2) that there was a vibrating bed in the "private room"; 3) that there was a video camera that Corsi used to videotape the girls changing clothes; 4) that the last time this occurred was close to Easter the previous year; 5) that there were videotapes in a drawer under the bed, of which C.M. had taken some to Corsi's car; 6) that no one could enter the private room when Corsi was in there with someone else; 7) that there was a pool in the room; 8) that there was

a secret door in the ceiling that had a pull down ladder; 9) that Corsi told him his penis was his pickle and that a girls private area is a hamburger; and that 10) the boys and "Mr. Dave" talk together about girls.

No child – C.M. included – made any allegation that Corsi or anyone else engaged in any sort of objectionable contact with any child, at the Daycare or otherwise.

Rinear arranged for Detective Kelly Fatheree to surreptitiously tour the Daycare, posing as a parent. Brothers showed her around the facility, and Fatheree noted that Brothers gave her access to any room she wished. Fatheree found neither a vibrating bed nor a pool.

Rinear requested a search warrant for the Daycare; in that warrant, Rinear falsely declared that Brothers had denied Fatheree access to a room marked with the word "private" and the word "eye," despite the fact that Fatheree never asked for access to that room.

On the afternoon of May 23, 2002, while parents were picking up their children, a group of Sheriff's deputies stormed into the Daycare, showed their badges, presented a search warrant to Brothers and searched the building. The deputies ordered Brothers to unlock every door to facilitate a search of the entire premises. Accompanied by a deputy, Brothers unlocked the business office door, the doors to what the deputies erroneously referred to as the "private eye room," the door to Corsi's and Brothers' personal bathroom in the "private eye room," and the back door to the outside.

From the locked personal bathroom, Deputy Larry Limbert seized a handgun, a knife, a *Sports*

Illustrated calendar depicting adult women in bathing suits, and two pieces of drywall, one about 18-by-24 inches and the other about 18-by-18 inches square. From the main office, deputies seized, among other things: eight photographs of adult women; VHS videotapes; owner's manuals to security cameras; 20 photographs from a *Sports Illustrated* swimsuit calendar; a VHS video camera; a yellow and black video camera; a Polaroid camera; a television set and VCR; computer disks; and a computer hard drive; an "Indiana Jones" toy whip; a microcassette recorder; and a plastic foam hammer. From the front office deputies seized two computer hard drives and a video tape entitled "India Live."

From the private office deputies seized VHS movie tapes, a box of computer diskettes, and a calendar depicting adult women. The deputies also found that the private office – which they labeled the "private eye" office – contained a futon couch and that the ceilings were dropped tile ceilings, which could not support the weight of a 9-year-old child.

Several of the tiles were punctured with holes; these, Corsi explained to the officers, were made by the building's owner, Ken Kubick, who strung hoses and funnels through the holes in the ceilings to catch drips from the building's leaky roof. He explained that the hoses were sometimes run into the bathroom sinks and other drains to direct water leaking through the roof. In every location where there were holes in ceiling tiles, there were water stains around those holes that were obvious to the deputies, according to Deputy Rogers. Rinear also saw funnels with hoses attached, and acknowledged that she observed evidence that the roof leaked.

No pictures or videotapes of nude children were found during the search. No pictures of unclothed people – children or otherwise – were found in rooms to which children had regular and unrestricted access. Despite finding no evidence of a pool, a vibrating bed or images of unclothed children at the Daycare, Rinear filed affidavits in Cuyahoga Falls Municipal Court, seeking a warrant for Corsi's arrest. No risk to the health or safety of a child could be legitimately articulated, and no other children were interviewed prior to Corsi's arrest.

After the arrest, on May 31, 2002 a search of David Corsi's residence proceeded on virtually the same affidavit that Rinear had provided for the first search. The predominant changes were 1) the address to be searched listed on the first page; 2) a statement by Rinear that "based on 11 years experience people who commit the type of crimes outlined in this affidavit secret items as memorabilia in their homes," despite the fact that the bulk of her experience was as a patrol officer, she had been a detective for only two years, and her training regarding sex offenses against children constituted a single class; 3) that David Corsi had been arrested; and 4) that Rinear "believed" evidence to support the charges would be found in his residence.

In making the affidavit, which was supplied to a magistrate in Carroll County, Ohio, where Corsi's home is located, Rinear excluded the following information: 1) no pool was found in Fatheree's tour of the Daycare or in the first search of the Daycare; 2) no vibrating bed was found in the Daycare; 3) no photographs of children were found during the search of the Daycare; 4) she did not have 11 years of specialized experience in prosecuting offenses

against children, or even three years as a detective; 5) her training in recognizing and prosecuting offenses against children consisted of a single class; and 6) no drop-down door featuring a folding ladder existed to provide access above the daycare's ceiling.

Nothing incriminating was found in David Corsi's home. When C.M. Finally admitted that he made up his story, the criminal case against Corsi was dismissed. Nevertheless, the business Corsi and Brothers founded was destroyed by the investigation. Corsi's personal life was left in ruin; the neighbors with whom he had been friendly for decades, and who were spectators to Summit County Sheriff investigators' search of his house, speak to him no more.

In their lawsuit, Brothers and Corsi complained about the misleading nature of the second search warrant affidavit, arguing that the Fourth Amendment demanded that Summit County deputies disclose in their affidavit the fact that they did not find the key pieces of evidence that they expected to find at the Daycare. The absence of these pieces of evidence, Corsi and Brothers assert, reasonably ought to have called C.M.'s credibility into question, and was itself evidence. Again, the deputies expected to find a vibrating bed; none existed. The deputies expected to find a pool; none existed. The deputies expected to find videotapes and photographs of the Daycare's female charges in various states of undress; none existed. The deputies expected to find a drop-down door with a folding ladder that could be used to gain access to the space above the daycare's ceiling; none existed.

Nevertheless, the trial court granted summary judgment to the Summit County

defendants on all of Brothers' and Corsi's claims, holding that Rinear and her supervisor, Inspector Thornton, could not have deliberately withheld the information from the affidavit because they subjectively believed it wasn't material to C.M.'S credibility or (though it is not directly stated) to probable cause.

> Further, the remarks cited earlier from Detective Rinear and Inspector Thornton show that at least subjectively the officers believed that the vibrating bed and pool could have been removed in the period following C.M.'s statement.

Claudia Brothers, et al., v. County of Summit, et al., No. 5:03 cv 1002, slip op. at 36, 2007 WL 1567662 (N.D. Ohio May 25, 2007).

> These facts do not present a substantial preliminary showing of false statement by the affiant. Plaintiffs' burden is to make a strong preliminary showing that Detective Rinear's omissions were made "with an intention to mislead." *** Consequently plaintiffs have failed to meet the required showing that the affiant had an intention to mislead by excluding critical evidence from the affidavit.

Id., slip op. at 37.

The Petitioners timely appealed that decision to the United States Court of Appeals for the Sixth

Circuit, which affirmed virtually without comment on March 27, 2008. After briefly reciting a summary of the case, the Circuit concluded its two-page decision with as follows:

> Applying a de novo standard of review, as we must, *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc), we conclude that the district court's well-reasoned and thorough opinion supports the judgment in favor of Defendants and that the issuance of a detailed written opinion from this Court would be unduly repetitious. Accordingly, the judgment rendered by the district court is affirmed on the basis of the reasoning set forth in its May 25, 2007 opinion.

Claudia Brothers, et al., v. County of Summit, et al., 271 Fed.Appx. 518, No. 07-3840, slip op. At 2, 2008 WL 867883 (6th Cir. March 27, 2008), *rehearing denied,* July 10, 2008. The Petitioners then made a Petition for Rehearing En Banc to the Sixth Circuit; that petition was denied on July 10, 2008.

The Petitioners now ask this Court for review.

ARGUMENT

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The protection against unreasonable searches and seizures, particularly unreasonable intrusions by law enforcement officers into one's home, has been of great interest to the Court - and for good reason.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. ... When the right of privacy

> must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed 436 (1948). Furthermore:

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremburg Trials: 'These (Fourth Amendment rights), I protest, are not merely second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.' *Brinegar v. United States*, 338 U.S. 160, 180, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (Jackson, J., dissenting).

Alameida-Sanchez v. United States, 413 U.S. 266, 273-274, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

This Court has held that it is essential for judicial officers to have before them truthful and accurate information in the affidavits supporting search warrant applications, so that they may determine independently and "in a commonsense and realistic fashion" whether probable cause for a search exists. See *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 607 (1978); and *United States v. Ventresca*, 380 U.S.102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The concept should be without cavil.

In *Franks*, the Court held that if a police officer makes a false statement knowingly and intentionally, or with reckless disregard for the truth in an affidavit for a warrant, then the false statements must be disregarded in deciding whether the affidavit demonstrates probable cause. 438 U.S. at 171. In *Stewart v. Donges*, the court found the *Franks* standards of "deliberate falsehood" and "reckless disregard" to cover material omissions. 915 F.2d 572, 582 (10th Cir. 1990).

In this case, Rinear withheld critical information from the Carroll County magistrate considering her requests for a warrant to search Corsi's home, information that would have called C.M.'s veracity into question and likely would have caused the magistrates to deny the warrant.

It is, after all, settled that law enforcement officers must present the judicial officer with information germane to their informant's veracity, and the basis of their informant's knowledge, when they ask a judge or magistrate for a search warrant. See *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); see also *United States v. Williams*, 224 F.3d 530, 532 (6th Cir. 2000). Thus,

Rinear's failure to provide exculpatory information and context to the judges who ultimately approved the warrants for search and arrest was "...an unthinkable imposition upon [judicial] authority [for] a warrant affidavit to contain a deliberately or recklessly false statement . . . ." *Franks*, 438 U.S. at 165. An officer also cannot rely upon evidence that is contradicted by direct observation – such as the absence of a pool, a vibrating bed, or a ceiling that would support the weight of a child. See *Fisher v. Harden*, 398 F.3d 837, 843, *cert. denied*, 546 U.S. 1075, 126 S.Ct. 838, 163 L.Ed.2d 706 (2005).

Unique issue. This Court, however, has not squarely addressed whether law enforcement officers must disclose in a second or subsequent search warrant affidavit information discovered during an initial search that casts doubt upon the veracity of a confidential informant. Similarly, no court has squarely enunciated that law enforcement officers must disclose in a second/subsequent search warrant affidavit the *absence* of items that, based upon their confidential informant's information, they expected to find.

The Petitioners urge this Court to take this case in order to answer these questions, which not only applies to this case, but may also apply to cases involving requests to expand wiretaps. See, e.g., *United States v. Meling*, 47 F.3d 1546 (9th Cir. 1995) (applying *Franks* to applications to extend duration of wiretap).

Conflicts With Other Circuits. Without clearly saying so, the District Court found that Rinear's subjective belief in C.M.'s reliability (she testified she believes children do not lie), her subjective belief in the omitted facts' materiality, and her subjective

belief in Mr. Corsi's guilt were dispositive. The Sixth Circuit adopted the District Court's holding. This is a posture shared by the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Second Circuit. See *United States v. Dale*, 991 F.2d 819, 844 (D.C. Cir. 1993) (affiant's failure to disclose background and bias of informant does not establish reckless disregard), and *Walczyk v. Rio*, 496 F.3d 139, 161 (2nd Cir. 2007) (affiant need not volunteer every fact arguably mitigating against probable cause).

Other Circuits, however, have held that a police officer's subjective belief in either his informant's reliability or the materiality of potentially exculpatory information is irrelevant; the officer must include the information.

> Detective Johnson contends that these facts were not material to the probable cause determination because they did not, in his mind, exclude Kohler as a suspect in the serial killings. The issue is not, however, whether the omitted facts were material to Detective Johnson's determination of probable cause; rather, the issue is whether the omitted facts were material to Judge Anderson's determination of probable cause. See *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir.2000) ("[A] police officer cannot make unilateral decisions about the materiality of information, or, after satisfying him or herself that probable cause exists, merely inform

> the magistrate or judge of inculpatory evidence.").

Kohler v. Englade, 470 F.3d 1104, 1113, FN9 (5th Cir. 2006).

In a case involving a *Franks* challenge to an application to extend the duration of a wiretap, the Ninth District took the Federal Bureau of Investigation to task for failing to disclose that the FBI had learned, subsequent to the initial wiretap application, that its key informant had been convicted of crimes involving dishonesty and had been committed on several occasions to a mental hospital to treat his schizophrenia. In that case, the court found the omission was committed either knowingly or with reckless disregard for the truth, and wrote, "This silence is as troubling as it is unjustifiable." *Meling*, 47 F.3d at 1554. The Ninth Circuit found that the FBI had also included enough other, new information to support probable cause for the wiretap extension, and therefore denied the *Franks* challenge, but nevertheless noted that "[t]his conclusion should in no way commend similar practices to the FBI in the future. We understand the urgency the FBI agents felt ... But this does not justify deliberate or reckless misrepresentations in wiretap applications." *Meling*, 47 F.3d at 1555, FN 2.

Also instructive are the Seventh Circuit's factors for determining whether a confidential informant is reliable. See *United States v. Taylor*, 471 F.3d 832, 839 (7th Cir. 2007):

> When an informant, such as CS 241, provides the facts and circumstances used to support a finding of probable

> cause, we determine the legitimacy of the probable cause finding by assessing the informant's "reliability, veracity and basis of knowledge." *United States v. Olson*, 408 F.3d 366, 370 (7th Cir. 2005). Our inquiry considers whether the informant "(1) had firsthand knowledge; (2) provided sufficient details; (3) relayed information which was subsequently corroborated; and (4) testified at a probable cause hearing."

Id.

Similarly, other circuits do not presume credibility.

> Informants are not presumed to be credible, and the government is generally required to show by the totality of the circumstances either that the informant has provided reliable information in the past or that the information has been corroborated through independent investigation. See, e.g., *United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005) ("Where corroboration or independent investigation after receipt of an anonymous tip is lacking-and thus the predictive value of the tip goes untested before a warrant is issued-courts have found officers' subsequent reliance on the warrant unreasonable.").

United States v. Yusuf, 461 F.3d 374, 384-385 (3rd Cir. 2006).

In this case, C.M.'S information was not corroborated by the Daycare search. Instead, it was contradicted by the deputies' failure to find the items that C.M. Told them they would find. Rinear knew that she and the deputies did not find these items, and despite this knowledge, she purposefully withheld it from the Carroll County magistrate.

Absence of Evidence Is Evidence. Furthermore, the lack of evidence can be evidence, a concept that apparently escaped the deputies, but that has been recognized in both Fed.R.Evid. 803(7) and Ohio R.Evid. 803(7), both of which state:

> **(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) [records of regularly conducted activity], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

This is not a situation where police officers have been the unwitting victims of their confidential informant's prevarication. In this case, Summit

County deputies had information before them – information gleaned during the daycare search – that objectively ought to have cast doubt upon C.M.'S veracity.

Materiality. There is no Fourth Amendment violation if the omitted information is irrelevant, see *Franks*, 438 U.S. at 171, see also *United States v. Reiner,* 500 F.3d 10, 15 (1st Cir. 2007), but in this case, the information was relevant: it went directly to the reliability of the informant, C.M. His story about Corsi and the daycare placed a dangerous "spin" on the meaning of the items found in the daycare search, and without that "spin," none of the items, individually or combined, provided probable cause to search Mr. Corsi's home.

There is no requirement that a search warrant affiant include all *possible* potentially exculpatory theories that *might* remotely explain away probable cause, see *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008) (omission of theories that internet hackers were capable of surreptitiously implanting pornography on defendant's computer not fatal to warrant), but this is not such a case. No such hypothetical existed here. In this case, deputies had a confidential informant whose credibility ought to have been objectively assessed by the Carroll County magistrate, and whose credibility could have been assessed if the deputies had not withheld this information.

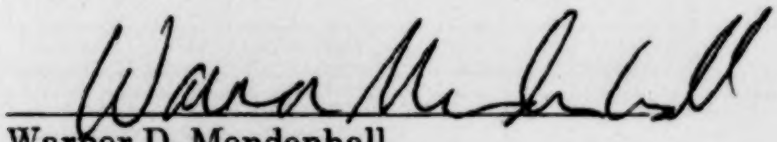
Knowing and Deliberate Omissions. Not only did Rinear knowingly withhold this information, the fact that she "cut and pasted" material virtually verbatim from her first affidavit into her second demonstrates a reckless disregard for the truth. See

United States v. Shields, 458 F.3d 269, 278 (3rd Cir. 2006) (disapproval of "template" search warrant affidavit used, with varying degrees of inaccuracy, in prosecution of multiple child pornography suspects).

CONCLUSION

Again, this Court has not directly spoken to the questions the Petitioners have presented, and on the key holding in this case, the Sixth Circuit's decision conflicts with those of other Circuits. On these grounds, the Petitioners respectfully ask the Court to Grant them a Writ of Certiorari.

Respectfully submitted,



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APPENDIX

Please see separate volumes